

**TENNESSEE DEPARTMENT OF REVENUE  
LETTER RULING #97-04**

**WARNING**

**Letter rulings are binding on the Department only with respect to the individual taxpayer being addressed in the ruling. This presentation of the ruling in a redacted form is informational only. Rulings are made in response to particular facts presented and are not intended necessarily as statements of Department policy.**

**SUBJECT**

Under the facts presented, is The Taxpayer subject to Tennessee corporate franchise, excise taxes because one of its corporate officers lives in Tennessee and works out of his home?

**SCOPE**

This letter ruling is an interpretation and application of the tax law as it relates to a specific set of existing facts furnished to the Department by the taxpayer. The rulings herein are binding upon the Department, and are applicable only to the individual taxpayer being addressed.

This letter ruling may be revoked or modified by the Commissioner at any time. Such revocation or modification shall be effective retroactively unless the following conditions are met, in which case the revocation shall be prospective only:

- (A) The taxpayer must not have misstated or omitted material facts involved in the transaction;
- (B) Facts that develop later must not be materially different from the facts upon which the ruling was based;
- (C) The applicable law must not have been changed or amended;
- (D) The ruling must have been issued originally with respect to a prospective or proposed transaction; and
- (E) The taxpayer directly involved must have acted in good faith in relying upon the ruling and a retroactive revocation of the ruling must inure to his detriment.

**FACTS**

The Taxpayer manufactures computer software that is described as a [PRODUCT 1] operating system. The Taxpayer has no salesmen in Tennessee. Its products are sold in

Tennessee through retail stores and are also purchased by [INDUSTRY] manufacturers who include [PRODUCT 1] with the [PRODUCTS] they make and sell. Prior to [DATE], The Taxpayer's Tennessee activities were protected from franchise, excise taxation by Title 15 U.S.C.A. §§ 381-384, also known as Public Law 86-272.

On [DATE], The Taxpayer's [TITLE OF CORPORATE OFFICER] of Business Development (The Officer) established his home in Tennessee. The Officer had attended [TENNESSEE SCHOOL] some years ago. [OCCURRENCE OF AN EVENT] the previous year and he wanted to return to Tennessee and reestablish old friendships. His decision to move to Tennessee from [STATE A - NOT TENNESSEE] for personal reasons was strongly opposed by The Taxpayer but was permitted in view of The Officer's strong desire to move and the fact that he was considered too valuable to risk losing over the relocation issue. The Officer received no salary increase upon moving to Tennessee. He does receive an annual salary increase each [MONTH OF YEAR], but such increases are in line with his usual ordinary salary increases.

The Officer's position involves strategic planning, mergers and acquisitions, along with related activities. He travels about 50% of the time and works in his home the other 50% reviewing "big picture" documents and business plans. The Officer uses a cellular phone to telecommute to The Taxpayer's [CITY] office in [STATE A].

The Taxpayer has not had contracts, acquisitions, mergers or strategic planning involving persons or companies who do business in Tennessee or who are located in Tennessee. The Officer has not had any business contacts in Tennessee and does not travel in Tennessee except to and from his home to the airport to fly in and out of Tennessee.

The Officer travels by commercial aircraft to locations outside Tennessee. He uses his own automobile to travel from his Tennessee home to and from the airport. The Taxpayer pays him for his mileage to and from the airport, his airport parking, and his airline ticket. Since The Officer has no business contacts in Tennessee, he has no occasion to travel to points in Tennessee.

The Taxpayer has no office in Tennessee and, except for the cellular phone used by The Officer, does not own any of the furniture or equipment The Officer uses at his home in Tennessee. The cellular phone and the calls The Officer makes thereon are billed to and paid by The Taxpayer in [STATE A]. The Officer receives no automobile allowance and, other than mileage to and from the airport, airport parking and airline tickets, is not reimbursed for any expenses he may incur in connection with his work.

Neither the corporate officer's home phone number nor his cellular phone number is listed on his business card and The Taxpayer is not listed in any Tennessee phone book. The Taxpayer does not have letterhead with a Tennessee address. The Officer has a secretary at The Taxpayer's office in [STATE A] and anyone wanting to contact him will usually do so by calling the [STATE A] office and leaving a message. The Officer will

call in to his [STATE A] office on his cellular phone from time to time to pick up his messages and return his calls.

## ISSUES

Is The Taxpayer doing business in Tennessee so as to be subject to Tennessee corporate franchise, excise taxes?

## RULING

No.

## ANALYSIS

Tennessee corporate franchise, excise taxes are imposed on corporations for the privilege of doing business in Tennessee in corporate form. *First American National Bank v. Olsen*, 751 S.W.2d 417 at 421 (Tenn. 1987). The Tennessee Legislature clearly intends the franchise tax and the excise tax to be taken in tandem and construed together as one scheme of taxation. *Id.*

The term “doing business” is not uniformly defined in Tennessee statutes or case law and its meaning will vary dependent on the situation. See: *Broadmoor-Kingsport Apartments, Inc. v. State*, 686 S.W.2d 70 at 72 (Tenn. 1985). The inquiry into whether a corporation is doing business in Tennessee involves a qualitative and quantitative analysis. *Id.* Tennessee’s jurisdiction to impose its franchise, excise taxes is governed by the Due Process Clause and the Commerce Clause of the United States Constitution as interpreted by the U.S. Supreme Court. These two Constitutional requirements pose distinct limits on the taxing powers of states. *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 at 1909 (1992). In addition, Title 15 U.S.C.A. §§ 381-384, better known as Public Law 86-272, limits Tennessee’s ability to impose a tax based on income upon corporations engaged in the manufacture and sale of tangible goods when their Tennessee business activities do not go beyond the solicitation of sales by employees or independent contractors for out-of-state acceptance and shipment.

The Due Process Clause requires “some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax,” and that the “income attributed to the state for tax purposes must be rationally related to values connected with the taxing State.” *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 at 1909-10 (1992). A tax is rationally related to values connected with the taxing state if the taxpayer’s local activities are plainly accorded the protection and services of the taxing state. *Id.* at 1910. In other words, has the taxing state given anything, such as fire protection, police protection, protection of state courts, opportunities or benefits, for which it may ask taxes in return. See: *Asarco, Inc. v. Idaho State Tax Commission*, 102 S.Ct. 3103 (1992). In *Geoffrey, Inc. v. South Carolina Tax Commission*, 437 S.E.2d 13, at 18 (S.C. 1993), Certiorari Denied 114 S.Ct. 550 (1993), the court held that, under

certain circumstances, the providing of an orderly society in which to do business and earn income from within a state was sufficient to meet the protections and benefits requirement of the Due Process Clause. The nexus requirement of the Due Process Clause can be satisfied if a corporation has purposefully directed its activity at a state's economic forum. *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 at 1910 (1992).

The Taxpayer has no office or place of business in Tennessee. The Taxpayer's corporate officer does have an office in his home in Tennessee but, since The Taxpayer does not own any of the furniture or equipment in the office and does not reimburse The Officer for any office expenses he incurs, it appears the office is the individual property of the officer and is maintained at his election and entirely at his own personal expense. Except for the cellular phone used by The Officer who lives here, The Taxpayer has no property of any type in Tennessee.

The Taxpayer does not have a Tennessee telephone listing and does not list the corporate officer's home phone or his cellular phone on the business card of the corporate officer who lives in Tennessee. The Taxpayer does not have letterhead with a Tennessee address. The Taxpayer does own the cellular phone used by The Officer living in Tennessee and pays for the calls he makes thereon. In addition, The Taxpayer also reimburses The Officer for his mileage to and from the airport, his airport parking, and his airline ticket. However, under the circumstances described, The Taxpayer does not appear to have Tennessee activities which create sufficient nexus for Tennessee to impose its corporate franchise, excise taxes under the "doing business" standard set forth in T.C.A. §§ 67-4-806 and 67-4-903. This is especially true since the cellular phone is not used to conduct any of The Taxpayer's business with Tennessee contacts and none of the mileage, parking or airline expenses paid by The Taxpayer are associated with business contacts in Tennessee. The Taxpayer does not hold itself out to the public as being available for any business purpose in Tennessee. Other than activities which The Taxpayer states are protected from state taxation by Public Law 86-272, The Taxpayer does not carry on any business activity in Tennessee or earn any income from Tennessee sources.

In short, aside from activities protected by Public Law 86-272, The Taxpayer has no connection or contacts with Tennessee. It has an employee who lives in Tennessee, but derives no corporate income, benefits or protections from Tennessee as a result. The Taxpayer has not purposefully directed its business activities (other than business activities protected by Public Law 86-272) at Tennessee's economic market and has not availed itself of any Tennessee benefits or protections.

A tax will survive challenge under the Commerce Clause so long as it (1) is applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, 97 S.Ct. 1076 at 1079 (1977). As to the first requirement, since The Taxpayer does no business in Tennessee, it does not have connections with Tennessee which are substantial enough to legitimate

Tennessee's exercise of power over it. See: *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 at 1913 (1992). Under the facts given, imposition of Tennessee franchise, excise taxes would violate the third requirement. Such taxes would discriminate against interstate commerce because an unfair share of the tax burden would be passed onto interstate commerce. See: *Id.* at 1913. Tennessee provides no benefits or services to The Taxpayer so the fourth requirement of *Complete Auto* is not met.

The Taxpayer does not describe in detail the Tennessee activities that it claims are protected from state taxation by Public Law 86-272 but, in order to be protected by the federal law, such activities can not go beyond solicitation of sales in interstate commerce. In view of Public Law 86-272, Tennessee can not apply its excise tax to a corporation whose only business activity in Tennessee is solicitation of sales in interstate commerce and this Department has never attempted to apply franchise, excise taxes to such activities.

The Taxpayer is not "doing business" in Tennessee so as to be subject to Tennessee franchise, excise taxes. Imposition of Tennessee franchise, excise taxes in The Taxpayer's present factual situation would violate both the Due Process and Commerce Clauses of the United States Constitution. However, it should be kept in mind that a slight change in the facts could subject The Taxpayer to such taxes. For example, if The Taxpayer were to provide an office for its corporate officer in his home or if the corporate officer were to become involved in contracts, acquisitions mergers or strategic planning concerning business in Tennessee, then The Taxpayer would be subject to franchise, excise taxes.

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Arnold B. Clapp, Senior Tax Counsel

APPROVED: \_\_\_\_\_  
Ruth E. Johnson, Commissioner

DATE: 2-19-97